United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7215

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

JENNIFER MARAGET, a minor By Next Friend and mother, SANDRA MARAGET, Appellant	CIVIL APPEAL NO. _____
vs.	
BRIAN WRIGLEY, in his capacity as Principal of South Royalton High School; DONALD E. JONES, in his capacity as Superintendent of Schools, Windsor-Orange School District; **BETTY LE WHITE,** RICHARD ELLIS, HERBERT CRAWFORD, IRENE CAMP and BEATRICE DODGE, in their capacity as members of the Board of Education for South Royalton High School, Appellees	TEMPORARY DOCKET NO. 76-8141

On Appeal from the United States
District Court for the
District of Vermont

APPELLANT'S BRIEF

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TABLE OF CASES

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I. PRELIMINARY STATEMENT

The case comes on appeal from a decision of Judge James S. Holden of the United States District Court for the District of Vermont. Judge Holden's decision is unreported and at the time of this writing was issued directly from the bench and is therefore recorded only in the transcript of March 30, 1976.

II. STATEMENT OF THE CASE

This case comes before the Second Circuit Court of Appeals from an order issued by Judge James S. Holden from the bench. (Tr. 83-85).

The court denied plaintiff's request for injunctive relief restoring the plaintiff, Jennifer Maraget, to school at South Royalton High School.

Plaintiff commenced this action for injunctive relief and damages on March 22, 1976, seeking reinstatement at South Royalton High School pending a due process hearing on an incident which took place on January 19, 1976, and damages for the wrongful expulsion.

Plaintiff claimed jurisdiction under 28 U.S.C. §1343 and pendent jurisdiction.

A hearing was set on plaintiff's request for a temporary restraining order on March 24, 1976, for March 30th, 1976, and

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defendant's attorney, Leslie Pratt, was served with a show cause order on March 25, 1976, notifying him of the March 30th date. The summons, complaint, affidavits and motion for temporary restraining order were served prior to March 25, 1976.

On March 30, 1976, a hearing was held before Judge Holden. Jennifer Maraget testified as to the circumstances of the indefinite suspension on January 19, 1976. (Note: Jennifer was in school on January 20, 1976). Appellant had three or four conferences in the office of Appellee Wrigley on January 19, 1976. Appellant asked Appellee Wrigley for the nature of the evidence against her. (Tr. 9). Wrigley said he had questioned three girls concerning the incident on January 19, 1976, but he did not give Jennifer Mrraget an opportunity to confront and cross-examine any of the girls. (Tr. 57 & 58).

Jennifer Maraget was present on January 20, 1976, the day after the incident, (Tr. 59), but has not been in school since that time.

On January 29, 1976, the Appellees held a regular meeting of the school board and notified Jennifer Maraget's parents that the meeting would be held and a discussion of Jennifer's expulsion would take place. No mention was made of the charges against Jennifer. No notice was sent to Jennifer. No names of witnesses nor was the substance of their testimony given. (Tr. 12).

Mr. Maraget asked for a postponement of the January 29th

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hearing on the grounds that his wife was ill but the Appellees had their meeting anyway. (Tr. 69). The hearing on January 29th consisted of Appellee Wrigley, the principal of South Royalton High School reciting "a brief background history" of the incident and a report by Appellee Jones, superintendent, that he had consulted with the local town health officer concerning the expulsion as required by 16 V.S.A. §1162. The board voted to expell Jennifer Maraget.

Upon receiving information of the expulsion, Peter Maraget requested another hearing. The request was granted and a hearing was held on February 13, 1976. (Tr. 11). The school board again failed to give notice of the charges, names of witnesses and substance of their testimony. (Tr. 14). At the hearing, the school principal recommended expulsion on the basis of a so-called three suspension rule. (Tr. 14). Appellant had no way of knowing that she was being expelled as a result of such a rule. (Tr. 13).

Judge Holden specifically states on the record that there was no notice to the parents of "what the nature of the proceedings are going to be, that expulsion is going to be the final action, although it is recommended and then after the hearing was held, I am not certain on the evidence that has been presented here, whether the action of the school board was based on the three prior suspensions which Mr. Wrigley referred to or whether it was based on the statute that you referred to, 1162."(Tr.66-67).

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The hearing before Judge Holden took approximately 2 1/2 hours. At the end of the testimony, Judge Holden called a conference in chambers to discuss the evidence before him and the possible remedies available. Judge Holden did indicate that he thought Jennifer Maraget was suffering irreparable harm by being out of school but indicated that he would not order her reinstatement in school. He stated that the girl was obviously very upset by the incident but the school was also upset and he did not see that it would serve any of the parties to reinstate her. He did say that he would order a hearing to be held within ten (10) days and adjourned the hearing for ten (10) days for the hearing to take place before an impartial hearing officer.

Judge Holden then went back on the bench and recited his order on the record. His order sets forth that the court refuses to apply any "injunctive powers . . . by way of requiring the defendants to take Jennifer Maraget, the plaintiff, back into the school system at this time." It is this specific ruling from which the Appellant appeals. A notice of appeal was filed on April 5th with the United States District Court and on the same day a motion was filed in United States Court of Appeals for the Second Circuit asking for a preference under Rule 27(c).

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III. ISSUES PRESENTED FOR REVIEW

A. WHETHER OR NOT THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL UNDER 28 U.S.C. §1292(a)(1).

B. WHETHER OR NOT THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO GRANT INJUNCTIVE RELIEF TO REINSTATE THE APPELLANT IN SCHOOL AT SOUTH ROYALTON HIGH SCHOOL.

IV. ARGUMENT

A. 28 U.S.C. §1292(a)(1) CONFERS JURISDICTION ON THIS COURT

28 U.S.C. §1292(a)(1) states in part:

" (a) The court of appeals shall have jurisdiction of appeals from:

1. Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions. . . ."

The general rule, as stated by Appellees in their memorandum supporting their motion to dismiss, is that a temporary restraining order is not a final decision and thus not appealable under 28 U.S.C. §1291, nor is it reviewable as decision refusing an injunction under 28 U.S.C. §1292.

However, when the temporary restraining order is in reality a preliminary injunction hearing then a court of appeals does have jurisdiction. Morning Telegraph v. Powers, 450 F. 2d 97 (1971), (cert. den. 450 U.S. 934, 1972), 7 Moore Federal Practice, 6507..

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Judge Oakes set forth in Morning Telegraph the distinguishing characteristics between a preliminary injunction and a temporary restraining order. The temporary restraining order is ex parte, i.e., no hearing and has a propensity to "self destruct in 20 days". Id at 99. The preliminary injunction is granted after both sides are heard and has no time limit.

As has been set forth in the statement of the case, the hearing before Judge Holden, although labelled a temporary restraining, was a hearing on notice to all parties. The issues at the hearing were two: (1) whether due process had been given to the Appellant, Jennifer Maraget and (2) whether Jennifer Maraget should be reinstated in school pending a final hearing on the merits. Both sides produced witnesses and the hearing went on for some 2 1/2 hours during which the merits of these issues were discussed.

Appellant can only conclude that in actuality this hearing was a preliminaty injunction hearing and that she was denied relief, i.e. reinstatement on an indefinite basis. Appellee is merely attempting to evade review of the court's order by a name-calling exercize, a position specifically denounced in Judge Oakes' opinion.

Appellees fail to see the loss of school time as being irreparable to the Appellant and thus fail to see how the denial of injunctive relief on a 10-day basis continues to harm her.

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Fortunately, the Supreme Court has taken a different position on this issue. The school system in Goss v. Lopez, 419 U. S. 565, 42 L. Ed. 2d 725, at 135 made the same argument. That is, a loss of time from school for ten days was not a "severe detriment or grievous loss." Justice White specifically found the opposite: "A short suspension is, of course, a far milder deprivation than expulsion. But, education is perhaps the most important function of state and local governments. Brown v. Board of Education, 347 U.S. 483, 493, 98 L. Ed. 873 (1954) and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for ten days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied, nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary."

Judge Holden has merely taken it upon himself as a federal court to deny rights that the school system is unable to do by virtue of the Goss decision. Appellant asserts that a federal court is not impowered to do this.

B. THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO GRANT INJUNCTIVE RELIEF TO REINSTATE THE APPELLANT IN SCHOOL AT SOUTH ROYALTON HIGH SCHOOL.

As set forth in the statement of the case, Judge Holden stated in chambers but not in his order from the bench that

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Jennifer had suffered irreparable harm. Assuming for argument that Judge Holden had not made such a finding, Appellant's construe the language previously quoted by Justice White in Brown v. Board of Education that education is the most important function of state and local government and the logic that a failure to deliver that education raises a "severe detriment or grievous loss"/ to create a presumption of irreparable harm. The irreparable harm is presumed from the nature of the right that has been created. Dixon v. Alabama, 249 F. 2d 150, 157 (5th Circ. 1961), cert. denied 368 U.S. 930 (1961); Gratton v. Winooski School District Bd. of Education, et al, Civ. Action 74-86 (D. Vt. April 10, 1974); Cook v. Edwards, 341 F. Supp. 307 (D. N.H. 1972); Push v. Carey et al, Civ. 73 C2522 (N.D. Ill. Nov. 5, 1975).

Appellant went further than just to rely on that presumption. Lynn Maraget testified most eloquently to the effect of her loss of education in the two months since she has been out of school. (Tr. 17-19). Appellee's retort is how important can her education be if she is out of school two months before she can get into federal court. The audacity with which this is stated is beyond belief.

The Supreme Court sets out a definitive ruling on due process and reminds schools how important their role is in the lives of pupils and how the State legislature has enforced that obligation by compulsory attendance statutes.

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The school system (Appellees) responds by summarily suspending Appellant for the second or third time (depending on Appellee Brian Wrigley's calculations) without due process and then holds two "hearings" lacking in due process. It gets brought into federal court finally and says education means nothing to you student because you didn't ask to get into court fast enough.

Unfortunately, the effect of the federal court judge's confrontation of this blatant violation of constitutional rights is to merely tell the school system that it can go back again to hold a proper hearing and then she can be expelled again. (Tr. 84). The court is merely telling the student that procedural due process is a mockery.

To Judge Holden's credit is the question to the school officials whether the punishment (expulsion) was fitting for the offense to the school rules. However, what was lacking was the follow-up to insist that the student be reinstated. The whole experience is painful for the school system and for the student --- this, the court realizes. Jennifer Maraget has missed two months of school and misses another day for each day that the federal courts delay facing this issue. Jennifer doubts she will be able to make up the work for all the time missed. (Tr. 19). The Appellee Wrigley and Jones expressed their pain but not any concrete reason why Jennifer shouldn't be in school other than the vague statement that she was

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undesirable. (Tr. 73).

In Shanley v. N.E. Ind. School District, 460 F. 2d 960 (5th Circ. 1972), Cook v. Edwards, 341 F. Supp. 307 (D. N.H. 1972) and Woods v. Wright, 334 F. 2d 373 (5th Circ. 1964), the courts ordered reinstatement of the students pending a hearing on appeal.

In Shanley, supra, the Fifth Circuit overruled the district court's denial of injunctive relief, expedited the appeal and enjoined the school board from giving zeros to the students in courses resulting from the suspension and further enjoined the board from refusing to allow the students a reasonable opportunity to complete and submit for academic credit the work missed as a result of the suspension.

In Wood, supra, the Fifth Circuit ordered all students expelled by the school system to be reinstated even though the district court refused to reinstate the students. The court reasoned that without reinstatement, the student due process rights would do them little good if they were not immediately restored to school. Appellants argue similarly that if she is not reinstated almost immediately that reinstatement at some future date after a hearing might do her little good because it may be impossible for Appellant to make up the lost time without special tutoring and special programming in each course and in addition a summer session.

In Cook, Judge Bownes reinstated an A & B student who appeared at school intoxicated one morning even though the evidence at the temporary restraining order did not establish

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a violation of procedural due process. He ruled on the basis of substantive due process that a student could not be expelled, i.e. deprived of her right to a public education.

Appellant argues further that this basic substantive due process argument, i.e. the offense does not merit expulsion, is also Appellant's argument on the merits. That is, assuming the school board after a recommendation from an independent hearing officer again orders expulsion, Appellant is still arguing that ultimately the school board does not have the authority to expell her on the facts as related from the transcript taken before Judge Holden. Appellants will argue that the test to be employed for expulsion was hinted in Goss to be based upon the nature of the right involved. That is, high school education is such an important tool for social and economic standing. Blocking of that tool could interfere "with later opportunities for higher education and employment" and if the charges were sustained that no expulsion or long term suspension could be sustained unless the facts showed the student to be a danger to the safety of persons at the school. See also: Wood v. Strickland, 485 F 2d 186 (8th Circ. 1973) The Supreme Court did not rule on this issue at 43 L. Ed. 2nd 214, 220-221 (1975); In Re Anonymous, Civ. Action No. 3624 (M.D. Ala, 1972), reinstating a pregnant student; Paine v. Board of Regents, 355 F. Supp. 199 (W. D. Texas, 1972),

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reinstating a student convicted of a narcotics offense; P.A.R.C. v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972), and Mills v. D.C. Board of Education, 348 F. Supp. 866 (D. DC. 1972); Push v. Carey, et al, supra, reinstatement of a student accused of smoking marijuana; Mitchell v. King, ___ Conn. ____(Sup. Ct. 1975).

Vermont has a strong policy of guaranteeing equal opportunities to education for all of its students: Vermont Constitution, Article II, 64, 16 V.S.A. §1121 and 1222; 821, 822 guaranteeing all Vermont residents the right to free public education through high school; 1073 extending this right to persons over 18, pregnant women and married persons who have not yet completed elementary or secondary school.

On the negative side, Vermont has given superintendents the authority to expell"undesirables" under 16 V.S.A. §1162.

Appellants attack the constitutionality of this statute. Appellees state that they rely on this statute to expell the Appellant. (Tr. 66 & 67). Appellants maintain that the statute is too vague and ambiguous to furnish an adequate standard to deprive the plaintiff of her rights created by the other Vermont statutes to free public education and therefore is a nullity. Appellees therefore have no statutory basis to exclude her from the Vermont educational system and Appellant will prevail on the merits. Eisner v. Stamford Bd. of Educ., 440 F. 2d 803 (2nd Circ. 1971); Push v. Carey, et al, supra; Mitchell v. King,

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supra, and other cases cited at page 11 & 12 of this brief. See also: Grayned v. City of Rockford, 408 U.S. 104,109 (1972); Stacy v. Williams, 306 F. Supp. 963 (N.D. Miss. 1969),(three-judge court); Soglin v. Kauffman, 418 F. 2d 163 (7th Circ. 1969).

CONCLUSION

Wherefore, for all the above reasons, Appellant requests this court to reverse the lower court order and compel the court to reinstate Jennifer Maraget at South Royalton High School pending a determination on the merits.

Dated at Rutland, Vermont, this 8th day of April, A.D. 1976.

Respectfully submitted,

Patrick R. Berg

Patrick R. Berg
Vermont Legal Aid, Inc.
Attorneys for Appellants

CERTIFICATE OF SERVICE

This is to certify that I have, this 8th day of April, 1976, forwarded a copy of the foregoing APPELLANT'S BRIEF to Austin B. Noble, Esquire, attorney for appellees, by mailing the same to him via first class mail, postage prepaid, to his office at P. O. Box 159, Montpelier, Vermont 05602.

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